

TRACY WAYNE VICKERS,)	
)	
Plaintiff,)	Case No.: 2:20-cv-01401-GMN-NJK
vs.)	
)	ORDER
HENRY GODECKI, <i>et al.</i> ,)	
)	
Defendants.)	
)	

For the reasons discussed below, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion to Dismiss.

This case arises from a confrontation between Plaintiff and another inmate, Scott Kelley, while Plaintiff was incarcerated at Lovelock Correctional Center (“LCC”). (Compl. ¶¶ 13, 27, ECF No. 1). On August 10, 2017, a verbal confrontation took place between Plaintiff and Kelley, inside the Building 8 Unit. (*Id.* ¶ 28). At some point, Kelley walked away from the confrontation and returned with a baseball bat he allegedly retrieved from inside an unsecured storage unit inside Building 8. (*Id.* ¶ 29). Kelley then struck Plaintiff in the chest and abdominal area with the baseball bat. (*Id.* ¶¶ 28–31). After reporting the attack to Defendant Godecki and an unknown officer, Plaintiff spent approximately one day at Renown Medical Center in Reno, Nevada. (*Id.* ¶¶ 33–34).

1 Plaintiff filed an administrative grievance to complain that Kelley should not have had
2 unrestricted access to the baseball bat. (*Id.* ¶ 41). He alleges Defendants knew inmates could
3 use a bat as a deadly weapon and that inmates would sometimes act violently towards each
4 other. (*Id.* ¶¶ 45–46). Defendants Carpenter, an associate warden at LCC, and Del Porto, an
5 investigator for the Inspector General’s Office, later told Plaintiff that the bat did not have to be
6 secured because it was considered recreational equipment situated in a minimum custody
7 facility. (*Id.* ¶ 42). According to Plaintiff, Defendants Cegavske, Wickham, Baker, Daniels,
8 Sisolak, and Ford promulgated a policy of not monitoring and securing equipment, such as
9 baseball bats, at minimum custody facilities (the “Policy”). (*Id.* ¶ 43).

10 In response to these incidents, Plaintiff filed his Complaint alleging six causes of action:
11 (1) violation of Article 1 § 6 of the Nevada Constitution; (2) violation of the Fourteenth
12 Amendment to the U.S. Constitution, specifically under the Equal Protection Clause; (3)
13 violation of the Eighth Amendment of the U.S. Constitution, specifically for deliberate
14 indifference; (4) negligence; (5) negligent hiring, training, selection, and supervision; and (6)
15 gross negligence. (*Id.* ¶¶ 52–73). Defendants filed the instant motion, seeking dismissal of
16 Plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a
17 claim. (*See generally* Mot. Dismiss (“MTD”), ECF No. 14).

18 **II. LEGAL STANDARD**

19 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
20 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
21 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
22 which it rests, and although a court must take all factual allegations as true, legal conclusions
23 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
24 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
25 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain

1 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
2 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
3 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
4 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This
5 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

6 “Generally, a district court may not consider any material beyond the pleadings in ruling
7 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
8 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the
9 complaint may be considered.” *Id.* Similarly, “documents whose contents are alleged in a
10 complaint and whose authenticity no party questions, but which are not physically attached to
11 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v.*
12 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take
13 judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282
14 (9th Cir. 1986). Otherwise, if a court considers materials outside of the pleadings, the motion
15 to dismiss is converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

16 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
17 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
18 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
19 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
20 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
21 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
22 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
23 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

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1 **III. DISCUSSION**

2 Defendants move to dismiss Plaintiff's Complaint on the following grounds: (1) the
 3 Eleventh Amendment immunizes Defendants from Plaintiff's state tort claims regarding
 4 negligence, negligent hiring, training, selection and supervision, and gross negligence; (2)
 5 Defendants are entitled to qualified and discretionary immunity; (3) Plaintiff cannot show he is
 6 part of a protected class or that a policy was created within LCC with discriminatory intent or
 7 purpose; (4) 42 U.S.C. § 1983 does not provide a cause of action for claims alleging violations
 8 of state claims alone; (5) Plaintiff failed to plead sufficient facts showing Defendants failed to
 9 properly supervise or train any Nevada Department of Corrections ("NDOC") employee; and
 10 (6) Plaintiff failed to plead personal participation of the Defendants.¹ (*See generally* MTD, ECF
 11 No. 14). The Court first discusses Eleventh Amendment immunity, followed by a discussion of
 12 Plaintiff's § 1983 claims, and finally will address Plaintiff's remaining state law claims.

13 **A. Eleventh Amendment Immunity**

14 The Eleventh Amendment to the U.S. Constitution immunizes states from suits by their
 15 own citizens seeking money damages. *Jackson v. Hayakawa*, 682 F.2d 1344, 1349 (9th Cir.
 16 1982). However, a state may waive its Eleventh Amendment immunity if it consents via state
 17 statute or constitutional provision. *Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1997). In
 18 addition, supplemental jurisdiction under "28 U.S.C. § 1367 does not abrogate state sovereign
 19 immunity for supplemental state law claims." *Stanley v. Trustees of Cal. State Univ.*, 433 F.3d
 20 1129, 1133–34 (9th Cir. 2006). Despite this, the Eleventh Amendment does not bar suits
 21 seeking damages against state officials in their individual capacity. *Pena v. Gardner*, 976 F.2d
 22 469, 473 (9th Cir. 1992), *as amended* (Oct. 9, 1992).

25 ¹ The Court declines to consider Defendants' personal participation argument because Defendants fail to identify which claim it corresponds to.

Here, Plaintiff filed his Complaint against Defendants in their official and individual capacities, except for Godecki, who Plaintiff only accuses in his individual capacity. The Complaint alleges that Defendants violated his federal and state constitutional rights against cruel and unusual punishment and his federal constitutional equal protection rights. (Compl. ¶¶ 52–61). Plaintiff also claims Defendants committed negligence, gross negligence, and negligently hired, trained, selected and supervised employees. (*Id.* ¶¶ 62–73). The Court first addresses Plaintiff’s claims against Defendants in their official capacities and then turns to the claims regarding Defendants in their individual capacities.

i. Claims Against Public Officials in their Official Capacities

Official capacity suits essentially constitute actions against the “entity of which an officer is an agent.” *Hafer v. Melo*, 502 U.S. 21, 25 (1991). As such, courts must treat suits against state officials in their official capacities as suits against the state. *Id.* Individual capacity suits, however, “seek to impose individual liability upon a government officer for actions taken under color of state law.” *Id.* Thus, “to establish personal liability in a 42 U.S.C. § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Eleventh Amendment immunity attaches to state officials sued in their official capacities. *Jackson*, 682 F.2d at 1350.

Here, the Court does not have jurisdiction over Plaintiff’s claims against Defendants in their official capacities. The Eleventh Amendment not only immunizes states, but state officials acting in their official capacities. *Jackson*, 682 F.2d at 1350. Further, the State of Nevada did not consent to be sued in federal court, thereby eliminating Plaintiff’s avenue to proceed on his claims against Defendants in their official capacities. *See* NRS § 41.031(3) (“The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.”).

Plaintiff attempts to claim that this Court still has supplemental jurisdiction over his official capacity claims pursuant to 28 U.S.C. § 1367. (Resp. to MTD 2:10–23, ECF No. 15). 28 U.S.C. § 1367 states that barring some exceptions, “in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” However, Plaintiff’s claim still fails because § 1367 does not abrogate state sovereign immunity under the Eleventh Amendment. *Stanley*, 433 F.3d at 1133–34. Thus, the Court dismisses Plaintiff’s 42 U.S.C. § 1983 and state law claims against Defendants Baker, Carpenter, Cegavske, Daniels, Del Porto, Ford, Sisolak, Wickham, and John/Jane Does 1-10 in their official capacities with prejudice.

ii. Claims Against Public Officials in their Individual Capacities

The Court now examines Plaintiff’s claims against Defendants in their individual capacities. While Plaintiff’s claims fail against the named defendants in their official capacities, the individual capacity claims may proceed. *Pena*, 976 F.2d at 473. Plaintiff’s Complaint alleges constitutional violations under § 1983, as well as state law claims. However, only violations of federal rights can be brought under § 1983. *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007). Therefore, the Court will first turn to Plaintiff’s claims under § 1983, and then proceed to an analysis of his state law claims.

1. 42 U.S.C. § 1983 Claims

To state a claim under § 1983, a plaintiff must allege: (1) a right secured by the Constitution or laws of the United States was violated; and (2) the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). A public official acts under color of state law when she acts “in the course of [her] official duties when the alleged incident occurred.” *Marks v. Parra*, 785 F.2d 1419, 1420 (9th

1 Cir. 1986). Moreover, § 1983 “‘is not itself a source of substantive rights,’ but merely provides
 2 ‘a method for vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490 US
 3 386, 393–94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

4 Here, Plaintiff alleges two main claims under § 1983: (1) deliberate indifference under
 5 the Eighth Amendment; and (2) equal protection under the Fourteenth Amendment. (Compl. ¶¶
 6 52–61). The Court will first discuss Plaintiff’s deliberate indifference claim, followed by his
 7 equal protection claim.

8 **a. Deliberate Indifference Claim²**

9 In his complaint, Plaintiff alleges Defendants Godecki and John/Jane Does 1-10 violated
 10 his Eighth Amendment right against cruel and unusual punishment by showing deliberate
 11 indifference to his health and safety. (Compl. ¶ 60). He argues that they did so by failing to
 12 remove and secure a baseball bat they knew could be used as a weapon and had no recreational
 13 purpose in Building 8 because inmates had no access to a baseball field. (*Id.* ¶ 60).

14 In the present Motion, Defendants claim qualified immunity shields them from liability
 15 regarding Plaintiff’s deliberate indifference claim. (MTD 12:1–2). Specifically, Defendants
 16 contend that requiring prison officials to secure recreational tools stored in minimum custody
 17 facilities is not a clearly established right. (*Id.* 13:13–15). They further claim Plaintiff failed to
 18 sufficiently plead that Defendants created or enforced this policy intending to cause
 19 constitutional harm, which he must do to proceed with a deliberate indifference claim. (*Id.*
 20 11:14–25) (citing *OSU Student All. v. Ray*, 699 F.3d 1053, 1073 n.15 (9th Cir. 2012)).

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 22
 23 ² The Court dismisses Plaintiff’s claim under Article 1 § 6 of the Nevada Constitution because the parties’
 24 arguments indicate that there is a lack of clarity as to whether there can be a private cause of action for violation
 25 of rights under the Nevada Constitution, and neither the Nevada Supreme Court nor the Legislature has explicitly
 created one. (*See* Resp. 4:3–4, ECF No. 15); (MTD 6:25–27). Nonetheless, the Court still considers Plaintiff’s
 claims of cruel and unusual punishment through its analysis of deliberate indifference under the Eighth
 Amendment to the U.S. Constitution.

1 Qualified immunity shields public officials from liability under the deliberate
2 indifference standard “unless their conduct violates ‘clearly established statutory or
3 constitutional rights of which a reasonable person would have known.’” *Horton*, 915 F.3d at
4 599 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity “operates
5 ‘to ensure that before they are subjected to suit, officers are on notice their conduct is
6 unlawful.’” *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002)
7 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001) *receded from on other grounds by Pearson*
8 *v. Callahan*, 555 U.S. 223, 235 (2009)). To determine whether a public official is entitled to
9 qualified immunity, a court must assess: “(1) whether the [official’s] conduct violated a
10 constitutional right, and (2) whether that right was clearly established at the time of the
11 incident.” *Castro*, 833 F.3d at 1066 (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

12 Two principles guide courts on how to interpret the clearly established law inquiry
13 within the context of deliberate indifference. First, courts must not define clearly established
14 law with a high level of generality. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). A right is
15 clearly established when “a legal principle [had] a sufficiently clear foundation in then-existing
16 precedent.” *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018). The rule must be settled, meaning “it is
17 dictated by ‘controlling authority’ or ‘a robust ‘consensus of cases of persuasive authority,’”
18 *Id.* at 589–90 (quoting *al-Kidd*, 563 U.S. at 741–42). More than merely being “suggested by
19 then-existing precedent,” the rule “must be clear enough that every reasonable official would
20 interpret it to establish the particular rule the plaintiff seeks to apply.” *Id.* at 590 (citing *Reichle*
21 *v. Howards*, 566 U.S. 658, 666 (2012). The opposite would mean “the rule is not one that
22 ‘every reasonable official’ would know.” *Id.* (quoting *Reichle*, 566 U.S. at 664).

23 Second, the Ninth Circuit has recognized that deliberate indifference claims rely on a
24 subjective test, which is at odds with the objective qualified immunity test. *Horton*, 915 F.3d at
25 600. Despite this, when analyzing deliberate indifference within the lens of qualified

1 immunity, the Court must use an objective-based test. *Id.* Thus, Plaintiff must show that, given
2 the available precedent at the time Kelley struck him with the baseball bat, a reasonable
3 official, knowing what Officer Godecki knew, would have comprehended that failing to secure
4 recreational equipment presented a substantial risk of harm to Plaintiff, and that the failure to
5 act was unconstitutional. *See Horton*, 915 F.3d at 600.

6 An inmate has a clearly established constitutional right not to be harmed by other
7 inmates. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016) (citing *Farmer*
8 *v. Brennan*, 511 U.S. 825, 833 (1994)) (“[A] right is clearly established when the ‘contours of
9 the right [are] sufficiently clear that a reasonable official would understand that what he is
10 doing violates that right. The ‘contours’ of [Appellant’s] right were [her] right to be free from
11 violence at the hands of other inmates.” (internal citations omitted)). Courts do not need a list
12 of every way an inmate may harm another to determine when a reasonable official would
13 understand her actions violated an inmate’s right. *Id.* at 1066. Similarly, an official may be
14 liable under the Eighth Amendment without an affirmative act causing the alleged harm; it is
15 sufficient for the official to know “that inmates face a substantial risk of serious harm and
16 disregard[] that risk by failing to take reasonable measures to abate it.” *Clem v. Lomeli*, 566
17 F.3d 1177, 1182 (9th Cir. 2009) (quoting *Farmer*, 511 U.S. at 847).

18 Here, Plaintiff has plead enough facts to find that Defendants violated Plaintiff’s right
19 against cruel and unusual punishment. As discussed above, under the Eighth Amendment’s
20 Cruel and Unusual Punishment Clause, Plaintiff has a constitutionally protected right against
21 being harmed by other inmates. *Castro*, 833 F.3d at 1067. Plaintiff sufficiently pleads that
22 another inmate, Kelley, harmed him with a baseball bat, and that the baseball bat was
23 accessible to Kelley because Defendants failed to secure it. (Compl. ¶¶ 28–31, 41). Further,
24 Plaintiff alleges that Defendants knew an unsecured baseball bat could be used as a weapon.
25 (Compl. ¶ 60). Although Plaintiff did not specifically allege the named defendants

1 “disregarded an excessive risk” to Plaintiff’s safety, he still plead that Defendants knew the bat
2 could be used as a weapon yet failed to secure it, indicating that by not securing it, they
3 disregarded an excessive risk. (*See id.*). As such, Plaintiff has plead facts sufficiently to show
4 that the Defendants violated Plaintiff’s constitutional right by not protecting him against harm
5 by other inmates.

6 Second, Plaintiff sufficiently claims that Defendants acted under color of state law when
7 the alleged violation occurred by alleging that they were acting in the course of their official
8 duties when the incident occurred. Thus, Defendants committed their actions under color of
9 state law. *See Marks*, 785 F.2d at 1420 (explaining that a public official acts under color of
10 state law when she acts “in the course of [her] official duties when the alleged incident
11 occurred”).

12 Next, the Court turns to whether the right not to be harmed by other inmates was clearly
13 established. The holding in *Castro* makes it apparent that this right was clearly established at
14 the time of the alleged violation. *Castro*, 833 F.3d at 1067; *see also Wesby*, 138 S. Ct. at 589–
15 90 (explaining that a rule is clearly established when “a legal principle [had] a sufficiently clear
16 foundation in then-existing precedent”). Thus, given the holding in *Castro*, promulgating that
17 an inmate has a constitutional right against being harmed by other inmates, was clearly
18 established at the time Kelley struck him with the baseball bat, a reasonable official, knowing
19 what Officer Godecki knew, would have comprehended that failing to secure recreational
20 equipment presented a substantial risk of harm to Plaintiff such that the failure to act was
21 unconstitutional. As such, the Court finds that qualified immunity does not protect Defendants
22 because Plaintiff adequately alleged that Defendants violated a clearly established
23 constitutional right. Thus, Plaintiff’s deliberate indifference claim survives the Motion to
24 Dismiss.

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b. Equal Protection Claim

In his complaint, Plaintiff contends that all Defendants, except Godecki, “deliberately failed to afford [him] the same protection” as other inmates against prisoners who had unrestricted access to potential weapons, such as a baseball bat, because of his minimum security custody status. (Compl. ¶ 56). Plaintiff claims Defendants knew Plaintiff was entitled to the same protection as other inmates despite his custody status; he avers there was no rational basis for allowing inmates unrestricted access to recreation equipment that could be used as a weapon. (*Id.* ¶ 57). In their motion, Defendants argue Plaintiff cannot show he is part of a protected class or that a policy was created with discriminatory intent or purpose. (MTD 7:10–12). They further contend inmates are not members of a protected class by having differing custody statuses. (*Id.* 7:17–18) (citing *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998)). Additionally, Defendants assert that Plaintiff failed to claim he was treated differently than other inmates of the same custody status. (*Id.* 7:27–8:3)

“To state a § 1983 claim for violation of the Equal Protection Clause ‘a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.’” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166 (9th Cir. 2005). To conduct an equal protection analysis, a plaintiff must first “identify the [defendant’s] classification of groups.” *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995), *as amended on denial of reh’g and reh’g en banc* (Dec. 29, 1995) (internal citations omitted). To do so, he may show defendants applied the law in a discriminatory way or “impose[d] different burdens on different classes of people.” *Id.* Next, plaintiff must identify the appropriate level of scrutiny with which to analyze his claims. *Id.* After establishing the classification and level of scrutiny, “it is necessary to identify a ‘similarly situated’ class against which the plaintiff’s class can be compared.” *Id.*

1 A plaintiff may also allege that she is a “class of one” to implicate equal protection. *Vill.*
2 *of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To succeed, a plaintiff must show
3 Defendants “intentionally treated [her] differently from others similarly situated and that there
4 is no rational basis for the difference in treatment.” *Id.*

5 Here, equal protection is not implicated because Plaintiff fails to allege he is a member
6 of a protected class. In his response to Defendants’ motion, Plaintiff argues he does not have to
7 show he is a member of a protected class to prove his claim. (Resp. to MTD 5:3–4). However,
8 Plaintiff’s argument is incorrect because he must sufficiently allege that he is a member of a
9 protected class to sustain an equal protection claim. *Freeman*, 68 F.3d at 1187. As a result, the
10 Court dismisses Plaintiff’s equal protection claim, but without prejudice because he may be
11 able to cure the deficiency in his Complaint by properly alleging membership in a protected
12 class.

13 **B. State Law Claims³**

14 Plaintiff additionally alleges three state law claims against Defendants in their individual
15 capacities, specifically: (1) negligence; (2) negligent hiring and supervision; and (3) gross
16 negligence. (Compl. ¶¶ 62–73). In their Motion, Defendants first argue that § 1983 only
17 provides a cause of action for violations of federal law, and that supplemental jurisdiction does
18 not apply here because § 1367 does not abrogate state sovereign immunity.⁴ (MTD 5:23–27),
19 5:3–5) (citing *Stanley v. Trustees of Cal. State Univ.*, 433 F.3d 1129, 1133-34 (9th Cir. 2006)).
20 Further, Defendants argue that they are entitled discretionary immunity on Plaintiff’s state law
21 claims. (MTD 15:1–17:1).

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25 ⁴Although § 1367 does not abrogate state sovereign immunity, the Eleventh Amendment does not bar suits against state officials in their individual capacities. *Pena*, 976 F.2d at 473.

1 ***i. Supplemental Jurisdiction***

2 As an initial matter, federal courts have original jurisdiction over civil actions arising
3 under federal law. 28 U.S.C. § 1331. However, courts may exercise supplemental jurisdiction
4 over state law claims pursuant to 28 U.S.C. § 1367 if said claims are identical to Plaintiff's
5 federal claims and based on the same factual allegations as the federal claims. *Munger v. City*
6 *of Glasgow Police Dep't*, 227 F.3d 1082, 1089 n.4 (9th Cir. 2000). This occurs when state and
7 federal law claims "'derive from a common nucleus of operative fact' and are such that a
8 plaintiff 'would ordinarily be expected to try them in one judicial proceeding.'" *Trustees of*
9 *Constr. Indus. & Laborers Health & Welfare Tr. v. Desert Valley Landscape & Maint., Inc.*,
10 333 F.3d 923, 925 (9th Cir. 2003).

11 Here, the Court will exercise supplemental jurisdiction over Plaintiff's state law claims
12 because all of his claims derive from a common nucleus of operative fact. For example, just
13 like in his deliberate indifference and equal protection claims, Plaintiff's tort claims allege that
14 Defendants failed to secure recreational equipment, or similarly, to supervise employees
15 regarding how to secure the recreational equipment. Thus, Plaintiff's state and federal claims
16 derive from a common nucleus of operative fact and exerting supplemental jurisdiction over
17 Plaintiff's state law claims is appropriate.

18 ***ii. Discretionary Immunity***

19 The Court now turns to an analysis of Defendants' discretionary immunity. NRS §
20 41.032(2) bars liability against public officials when they exercise or perform, or fail to
21 exercise or perform, a discretionary function or duty. Discretionary immunity shields public
22 officials from liability if their actions are discretionary, meaning they "(1) involve an element
23 of individual judgment or choice and (2) be based on considerations of social, economic, or
24 political policy." *Martinez v. Maruszczak*, 123 Nev. 433, 446–47 (2007). Thus, decisions
25 requiring "analysis of government policy concerns" are afforded discretionary immunity. *Id.* at

1 447 In analyzing discretionary immunity, courts “must assess cases on their facts, keeping in
 2 mind Congress’ purpose in enacting the exception: to prevent judicial second-guessing of
 3 legislative and administrative decisions grounded in social, economic, and political policy
 4 through the medium of an action in tort.” *Id.* at 446 (citation omitted).

5 Defendants broadly allege that they are immune to *any* state tort, pursuant to NRS §
 6 41.031(1) because the decision to create and implement a policy is the product of personal
 7 deliberation and policy considerations. (MTD 15:26–27, 17:20–22). Plaintiff, however, alleges
 8 specific acts of negligence, gross negligence, and negligent hiring that appear unrelated to
 9 Defendants’ decision to implement a policy. (*See* Compl. ¶ 63) (alleging that Defendants
 10 “fail[ed] to monitor and secure recreational equipment such as baseball bats which they knew
 11 could foreseeably result in prisoners accessing baseball bats and bringing harm to other
 12 prisoners.”). Given that Plaintiff does not allege a violation of social, economic, or political
 13 policy in its Complaint, the Court discusses each claim in turn.

14 **1. Negligence and Gross Negligence**

15 Plaintiff alleges that Defendants negligently failed to secure or monitor recreational
 16 equipment, such as baseball bats, which they knew could foreseeably result in prisoners
 17 accessing baseball bats and ultimately bring harm to other prisoners and/or staff. (Compl. ¶ 63).
 18 Additionally, Plaintiff alleges that Defendants were grossly negligent by similarly failing to
 19 secure equipment and by responding to Plaintiff’s grievance that higher security was
 20 unnecessary due to his minimum custody status. (*Id.* ¶ 70).

21 As to the first element, the Court finds that Defendants made a discretionary decision in
 22 deciding not to secure or monitor the recreational equipment. “A discretionary act ‘requires the
 23 exercise of personal deliberation, decision and judgment,’ while a ministerial act is ‘performed
 24 by an individual in a prescribed legal manner . . . without regard to, or the exercise of, the
 25 judgment of the individual’ and which ‘envisions direct adherence to a governing rule or

1 standard with compulsory result.” *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 878 (9th
 2 Cir. 2002) (citing *Foster v. Washoe Cty.*, 964 P.2d 788, 792 (Nev. 1998)). The Ninth Circuit,
 3 in *Carey*, determined that the officer’s arrest was a discretionary act because “the course of
 4 action . . . was not a prescribed act; rather it was an act resulting from the exercise of [the
 5 officer’s] own discretion.” *Id.* Likewise, Defendants’ actions were a result of their own
 6 discretion. Plaintiff has alleged sufficient facts to demonstrate that Defendants were aware of
 7 violent acts and the readily available tools at LCC, and further, that their failure to secure such
 8 tools was discretionary.

9 However, the alleged Policy does not appear to be based on considerations of social,
 10 economic, or political policy. *Martinez*, 123 Nev. at 446–47. Immunity applies under this
 11 second criterion only if “the injury-producing conduct is an integral part of governmental
 12 policy-making or planning, if the imposition of liability might jeopardize the quality of the
 13 governmental process, or if the legislative or executive branch’s power or responsibility would
 14 be usurped.” *Id.* Here, Defendants broadly argue that “the decision to create and implement a
 15 policy is the product [of] personal deliberation and policy considerations.” (MTD 17:20–22).
 16 Defendants further contend that “[i]mposing liability in this matter would usurp the Board of
 17 Prison Commissioners’ power and have a chilling effect on future deliberations.” (*Id.* 17:24–
 18 25). Defendants, however, do not further elaborate on how the Policy (*i.e.*, not securing
 19 recreational equipment such as baseball bats at minimum custody facilities), would usurp the
 20 Commissioners’ power. Given that the second element is not met, the Court denies
 21 Defendants’ Motion to Dismiss as to Plaintiff’s negligence and gross negligence claims.

22 **2. Negligent Hiring, Training, Selection, and Supervision**

23 Plaintiff alleges that Defendants had a mandatory duty to properly regulate, train, test,
 24 and supervise all officers and personnel, and subsequently breached their duty by failing to
 25 train and supervise their officers. (Compl. ¶¶ 66–67). Defendants maintain Plaintiff failed to

1 plead sufficient facts showing the named defendants failed to properly supervise or train any
2 Nevada Department of Corrections (“NDOC”) employee. (MTD 8:19–21).

3 Here, Plaintiff does not sufficiently plead allegations that Defendants negligently hired,
4 trained, selected, or supervised their employees. Plaintiff merely alleges conclusory facts that
5 alone are not enough to overcome the Motion to Dismiss legal standard. Thus, the Court grants
6 Defendants’ Motion to Dismiss as to Plaintiff’s negligent hiring, training, selection, and
7 supervision claim with leave to amend because it is possible Plaintiff may cure this deficiency
8 by alleging more specific facts.

9 **IV. CONCLUSION**

10 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss, (ECF No. 14), is
11 **GRANTED in part and DENIED in part.** Plaintiff’s claim against state officials in their
12 official capacities is dismissed with prejudice, and Plaintiff’s equal protection claim and
13 negligent hiring, training, selection, and supervision claim are dismissed without prejudice and
14 with leave to amend.

15 **IT IS FURTHER ORDERED** that if Plaintiff elects to amend his claims that are
16 dismissed without prejudice, Plaintiff shall have twenty-one days from the date of this Order to
17 do so.

18 Dated this 30 day of September, 2021.

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23 Gloria M. Navarro, District Judge
24 UNITED STATES DISTRICT COURT
25